(6)

No. 96-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GENERAL ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

ROBERT K. JOINER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

SECOND SUPPLEMENTAL BRIEF FOR PETITIONERS

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SECOND SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to Rule 15.8 of the Rules of this Court, petitioners respectfully draw to the Court's attention two new decisions by two courts of appeals that reject the standard of review adopted by the Eleventh Circuit in the present case.

1. In *Cavallo* v. *Star Enterprise*, Nos. 95-2540 and 95-2541, decided November 20, 1996, the Fourth Circuit explicitly disapproved the *Paoli* standard of "hard look" or "particularly stringent" review that the Eleventh Circuit explicitly approved here. The Fourth Circuit held:

> "But the parties disagree on the standard by which we review the district court's decision to exclude expert testimony. The Cavallos argue, quoting the Third Circuit's decision in *In re Paoli R.R. Yard PCB Litigation*, that trial judges should not be given

the same deference in their decisions to exclude expert evidence as they are given in their decisions about other types of evidence:

> The decision to exclude expert testimony resulting in a summary judgment is subject to a 'hard look' review by the appeals court, i.e., a less deferential review than the traditional abuse of discretion standard in light of 'a significant risk that district judges will set the threshold too high and will in fact force appellants to prove their case twice.'

Brief of Appellants at 3 (quoting 35 F.3d 717, 733 (3d Cir. 1994)). As the defendants point out, however, this court recently reached the opposite conclusion. In *Benedi* v. *McNeil-P.P.C., Inc.*, a Fourth Circuit panel stated that '*Daubert* [v. *Merrell Dow Pharmaceuticals, Inc.*,] clearly vests the district courts with discretion to determine the admissibility of expert testimony.' 66 F.3d 1378, 1384 (4th Cir. 1995) (citing 113 S. Ct. 2786 (1993)). Accordingly, we review the district court's decision only for abuse of discretion.

* * * *

> ". . . The Cavallos have shown that the question of admission is close, but we defer to the court's decision to exclude the evidence and affirm its summary judgment on Count I."

See pp. 5a-6a, 18a, *infra*.

2. In *Bogosian* v. *Mercedes-Benz of North America, Inc.*, No. 96-1287, decided November 21, 1996, the First Circuit reaffirmed that in reviewing *Daubert* exclusions "we will uphold the district court's ruling in this area unless it is 'manifestly erroneous.' *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962)"—exactly as petitioners unsuccessfully argued here to the Eleventh Circuit *—

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* Petitioners argued that "[a]lthough the Eleventh Circuit has not issued an opinion concerning the admissibility of expert testimony since the Supreme Court's decision in *Daubert*, nothing in *Daubert* gives any hint that the standard of review embraced in *Salem* . . . should now be changed. On the contrary, since *Daubert* was decided, nearly all of the Circuits have addressed the standard of review and continue to adhere to the rule of *Salem*." Joint Brief of Defendants-Appellees, No. 94-9131, 11th Cir., at 9 (footnote omitted). Petitioners also pointed out in seeking *en banc* review that by following *Paoli* and rejecting *Salem*, "[t]he majority's opinion also conflicts with the decisions of eleven other federal circuits . . . ." Suggestion of Rehearing En Banc of Defendants-Appellees, No. 94-9131, 11th Cir., at 5.

and concluded that "we cannot say that it abused its substantial discretion when finding inadequate the premises of the proposed testimony," and "we do not find the district court's decision to exclude Davidson's testimony to be manifestly erroneous." See pp. 24a-25a, 31a, 33a, *infra*.

The full texts of the Fourth Circuit and First Circuit opinions are reproduced in the addendum hereto.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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December 9, 1996

ADDENDUM

ADDENDUM

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2540

ARDITH CAVALLO,
Plaintiff-Appellant,

and

LAWRENCE CAVALLO,
Plaintiff,

v.

STAR ENTERPRISE; TEXACO REFINING AND MARKETING (EAST), INCORPORATED; SAUDI REFINING, INC.,
Defendants-Appellees.

No. 95-2541

LAWRENCE CAVALLO,
Plaintiff-Appellant,

and

ARDITH CAVALLO,
Plaintiff,

v.

STAR ENTERPRISE; TEXACO REFINING AND MARKETING (EAST), INCORPORATED; SAUDI REFINING, INC.,
Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
T. S. Ellis, III, District Judge; Albert V. Bryan, Jr.,
Senior District Judge.
(CA-94-1499-A)

Argued: April 3, 1996
Decided: November 20, 1996

Before ERVIN, Circuit Judge, LAY, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation, and TRAXLER, United States District Judge for the District of South Carolina, sitting by designation.

OPINION

ERVIN, Circuit Judge:

Ardith and Lawrence Cavallo sued Star Enterprise,[1] which operates a petroleum distribution terminal located near their home, alleging various damages from an underground petroleum release in 1990 and a fuel spill in 1991. Their complaint included four causes of action: Count I—"Negligence with Respect to AVJet Fuel Spill"; Count II—"Negligent Petroleum Release and Negligent Abatement and Remediation of the Petroleum Release"; Count III—"Common Law Trespass"; and Count IV—"Liability Under the State Water Control Law." The district court dismissed Counts II, III, and V under Fed. R. Civ. P. 12(b)(6), holding that they were barred by statutes of limitation and federal preemption. After discovery, the court granted Star's motion for summary judgment on Count I.

The Cavallos appeal. They contend that the district court applied an incorrect statute of limitation, misconstrued federal preemption doctrine, and erred in excluding the testimony of two of their experts.[2] We agree with

[1] Star Enterprise is a joint venture partnership between Texaco Refining and Marketing (EAST), Inc., and Saudi Refining, Inc. We refer to the defendants collectively as "Star."

[2] In addition to the questions they raise in their opening brief, the Cavallos add two new arguments in their Reply Brief: (1) that the statute of limitation applicable to their trespass and statutory claims is five years rather than two years, and (2) that "[t]he district court erred by failing to convert Star's Rule 12(b)(6) motion into a motion for summary judgment and by taking judicial notice of incomplete documents." The Cavallos abandoned the statute of limitation issue at oral argument, stating that they were not appealing it but might ask the district court to reconsider the question if we remand. Also at oral argument, the Cavallos noted that they had raised the conversion issue before the district court.

Under the decisions of this and the majority of circuits, an issue first argued in a reply brief is not properly before a court of appeals. *See Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995) (citing *United States v. Caicedo-Llanos*, 960 F.2d 158, 164 (D.C. Cir. 1992)), *cert. denied*, 116 S. Ct. 724 (1996); 9 James Wm. Moore, *Moore's Federal Practice* ¶ 228.02[2-3] (1995) ("The case law is to the effect that the appellant cannot raise new issues in a reply brief . . . ."). That the question was raised in the district court is immaterial. The Cavallos' omission of the issue from their initial brief denied Star an opportunity to respond, so considering it now "would be unfair to the appellee and would risk an improvident or ill-advised opinion on the legal issues raised." *Hunt*, 57 F.3d at 1338.

the Cavallos that the Complaint and the EPA Orders provide insufficient information to determine whether their claims are preempted. Thus we reverse the court's dismissal of Count II, that portion of Count III containing the loss of use and enjoyment claim, and Count IV and remand for further proceedings. We uphold the dismissal of that portion of Count III containing the personal injury claim, however, even though the court rested its decision on preemption, because it fails to state a claim under Virginia law. And we affirm the court's summary judgment on Count I, finding that the district court acted within its discretion by excluding the expert testimony.

I

Star's distribution terminal ("the Tank Farm") is located in Fairfax, Virginia, less than a mile west of the Cavallos' home. It includes office and warehouse space, a truck loading rack, underground storage tanks holding up to forty thousand gallons, and above-ground storage

tanks holding over seventeen million gallons. Drainage on the site is controlled by a containment dike and an on-site pond—water from the former is pumped into the latter—and the pond's contents are treated and released into local creeks.

On September 14, 1990, Fairfax residents noticed an oil "sheen" on the surface of Crook Branch Creek. Star soon acknowledged that a large amount of aviation fuel, diesel fuel, and gasoline had leaked into the soil and groundwater. Investigation by the Virginia State Water Control Board revealed an underground "plume" of various fuels. Thereafter, at the Board's request, the Environmental Protection Agency ("EPA") assumed responsibility for the investigation pursuant to the Resource Conservation and Recovery Act ("RCRA") § 7003, 42 U.S.C. § 6973. The EPA and Star negotiated an Administrative Consent Order—subsequently superseded by an Administrative Order—which required Star to implement corrective measures under EPA supervision. In accordance with the Orders, the EPA assumed control of Star's remediation efforts on July 3, 1991.

Another significant spill occurred on December 9, 1991. A valve was left open, allegedly due to the negligence of one of Star's employees or agents, and thirty-four thousand gallons of aviation fuel were released. The spill, contained by the dike, remained on the Tank Farm grounds for two weeks.

On the evening of the 1991 spill, the Cavallos were exposed to fuel vapors in a parking lot about five hundred feet from the Tank Farm. Both noticed an oil-like odor, and Mrs. Cavallo allegedly experienced an immediate irritating reaction. She was treated by several doctors, including Dr. Joseph Bellanti, Director of Allergy-Immunology at Georgetown Medical Center. Dr. Bellanti testified that Mrs. Cavallo suffered from sinusitis, conjunctivitis, and pulmonary dysfunction. His testimony was complemented by that of Dr. David Monroe, a toxicologist,

who reported that the exposure caused Mrs. Cavallo to experience burning eyes, conjunctivitis, sinusitis, and throat irritation. In addition to their exposure on the night of the 1991 spill, the Cavallos claim that since that time they continually have been exposed in their home to vapors from the Tank Farm. Mrs. Cavallo alleges that she continues to suffer physical symptoms caused by her exposure to the vapors, and both Cavallos claim damage to their property.

II

We review *de novo* the district court's summary judgments and 12(b)(6) dismissals. *See, e.g., Schatz v. Rosenberg,* 943 F.2d 485, 489 (4th Cir. 1991) (Rule 12(b)(6) dismissal), *cert. denied sub nom., Schatz v. Weinberg and Green,* 112 S. Ct. 1475 (1992); *Goodman v. RTC,* 7 F.3d 1123, 1126 (4th Cir. 1993) (summary judgment). But the parties disagree on the standard by which we review the district court's decision to exclude expert testimony. The Cavallos argue, quoting the Third Circuit's decision in *In re Paoli R.R. Yard PCB Litigation,* that trial judges should not be given the same deference in their decisions to exclude expert evidence as they are given in their decisions about other types of evidence:

> The decision to exclude expert testimony resulting in a summary judgment is subject to a "hard look" review by the appeals court, i.e., a less deferential review than the traditional abuse of discretion standard in light of "a significant risk that district judges will set the threshold too high and will in fact force appellants to prove their case twice."

Brief of Appellants at 3 (quoting 35 F.3d 717, 733 (3d Cir. 1994)). As the defendants point out, however, this court recently reached the opposite conclusion. In *Benedi v. McNeil-P.P.C., Inc.,* a Fourth Circuit panel stated that *"Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.,*] clearly vests the district courts with discretion to determine the admissibility of expert testimony." 66 F.3d

1378, 1384 (4th Cir. 1995) (citing 113 S. Ct. 2786 (1993)). Accordingly, we review the district court's decision only for abuse of discretion.

III

A

The district court dismissed Count III which contained both a personal injury claim by Mrs. Cavallo and a claim for the loss of the use and enjoyment of the Cavallo's real property resulting from exposure to vapors under the federal preemption doctrine. See complaint Para. 79. In addition to defending the court's preemption analysis, Star offers an alternative ground for upholding the district court's dismissal. Under Virginia law, it argues, the Cavallos must show physical impact on their property, and "wafting vapors . . . [are] insufficient as a matter of law." To support its position, Star cites another Fourth Circuit case involving the Tank Farm—*Adams v. Star Enterprise*, 51 F.3d 417, 422-25 (4th Cir. 1995).

The *Adams* plaintiffs, a group of landowners, sued for diminution of their property values and for health risks allegedly caused by their subdivision's proximity to an underground "plume" of petroleum products leaked from the Tank Farm. The landowners did not claim that the plume actually contaminated their soil, nor that they detected vapors from the leak on their property. The harm they alleged consisted of a stigma attached to their subdivision and a "*fear* of being exposed to toxic materials." *Id.* at 422 & n.5. The court held that the landowners' claims could not proceed, because Virginia law allowed recovery only if "the activity or condition complained of was actually *physically perceptible* from the plaintiff[s'] property." *Id.* at 422-23 (emphasis added).

Star argues that "wafting vapors" are not "physically perceptible" under *Adams*. We disagree. The context for the *Adams* court's focus on physical perception was its

discussion of *Foley v. Harris*, in which the Virginia Supreme Court allowed recovery against a defendant whose wrecked cars were visible from the plaintiffs' property. 286 S.E.2d 186, 190-91 (Va. 1982). The *Adams* court distinguished *Foley* because the *Foley* plaintiffs, unlike those in *Adams*, could sense the source of the offense from their own property. *Adams*, 51 F.3d at 422-23. Smell, like sight, certainly constitutes physical perception. And, although the Cavallos do not allege that they smelled the vapors, the physical symptoms Mrs. Cavallo suffered also might suffice. We conclude, based upon *Adams*, that the portion of Count III relating to the loss of use and enjoyment claim may be cognizable under Virginia law and that it was error to dismiss it under Fed. R. Civ. P. 12(b)(6) upon the alternative ground suggested by Star. Since the damage alleged in *Adams* was based simply upon a fear of future events and these allegations are much more direct, we hold that they are sufficient to sustain the loss of use and enjoyment portion of Count III under Virginia law.

We reach a different result, however, with reference to that portion of Count III asserting a personal injury claim by Mrs. Cavallo. The Virginia Supreme Court stated in *Foley* that "[t]he discomfort and annoyance [complained of] must . . . be significant and of a kind that would be suffered by a normal person in the community." *Foley*, 286 S.E.2d at 190, 191 (emphasis added), Mrs. Cavallo is not such a person; in fact, she alleges specifically that she is "highly susceptible" to petroleum vapors. Complaint ¶ 50. Hence, the personal injury portion of Count III is not cognizable under Virginia law and was properly dismissed.

B

An agreement between the parties treats all the Cavallos' claims as filed on December 8, 1993. The district court ruled that all counts but Count I are necessarily barred by the interaction of the statutes of limitation and

federal preemption, because: (1) the counts involve remediation efforts at the Tank Farm, (2) the statutes of limitation bar all claims based on events occurring before December 8, 1991, and (3) preemption bars all claims based on events occurring after September 1991, when the EPA took control of remediation efforts. Because we affirm on other grounds the district court's dismissal of the physical injury claim in Count III, *supra* part III.A, we limit our preemption analysis to Count II, the portion of Count II containing the loss of use and enjoyment claim, and Count IV only.

This court summarized the law of preemption in *Worm v. American Cyanamid Co.*:

> The principles of preemption resolve conflicts between federal and state law on the authority of Article VI of the Constitution, which provides:
>
> > This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> U.S. Const. Art. VI, § 2. From this Supremacy Clause flows the well-established principle that federal legislation, if enacted pursuant to the Congress' constitutionally delegated authority, can nullify conflicting state or local actions. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11, 6 L.Ed. 23 (1824).
>
> Preemption may occur on two bases, the first of which turns on discovering the intent of Congress. Congress may expressly provide that federal law supplants state authority in a particular field or its intent to do so may be inferred from its regulating so pervasively in the field as not to leave sufficient vacancy within which any state can act. *See, e.g., Rice v.*

> *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). But even absent an express or implied congressional intent to preempt state authority in a field, state law is nevertheless preempted by operation of law to the extent that it actually conflicts with federal law. *See Wisconsin Public Intervenor v. Mortier*, —— U.S. ——, 111 S.Ct. 2476, 2482, 115 L.Ed.2d 532 (1991); *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev. Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983).
>
> . . . When we address the question of whether state law actualy conflicts with federal law, we resolve the more specific inquiries of whether "it is impossible to comply with both state and federal law" or "whether the state law stands as an obstacle to the accomplishment of the full purposes and objectives" of federal law. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984).
>
> With these principles stated, we proceed to an examination of [the statute in question], first to determine if Congress intended by its enactment to supplant state authority in the field, and if not, whether state tort and warranty law conflicts with the federal regulatory scheme.

970 F.2d 1301, 1304-05 (4th Cir. 1992).

Two years after *Worm*, in *Feikema v. Texaco, Inc.*, 16 F.3d 1408 (4th Cir. 1994), this court addressed whether state-court relief would conflict with an EPA Consent Order. The *Feikema* plaintiffs sought damages and an injunction requiring

> excavation, treatment and replacement of contaminated soil to a specified depth and over a specified area; . . . "enhanced ground water extraction and bio-remediation to reduce the off-site contamination";

> and . . . construction of a "free phase hydrocarbon trench removal system across the water table."

Id. at 1416. Because the EPA Order in *Feikema* focused on a particular incident, and thus was not intended to supplant state authority in the entire field, the court applied only the second, actual-conflict prong of the *Worm* inquiry:

> [W]hen the EPA, acting within valid statutory authority of the RCRA and not arbitrarily, enters into a consent order, that order will also preempt conflicting state regulation, including a federal court order based on state common law. . . .
>
> . . . [T]he test for determining whether state law conflicts with federal law is whether "it is impossible to comply with both state and federal law" or whether "the state law stands as an obstacle to the accomplishment of the full purposes and objectives" of federal law.

Feikema, 16 F.3d at 1416 (quoting *Worm*, 970 F.2d at 1305) (emphasis added) (other citations omitted). Noting that the Consent Order "addresse[d] the same site and conditions covered by the homeowners' suit," the *Feikema* court determined that an injunction would conflict with the EPA's activities and thus was preempted. *Id.*

Regarding the damages claims, the *Feikema* court expressed greater reluctance to preempt state law. It quoted the Supreme Court's opinion in *Nader v. Allegheny Airlines, Inc.*:

> A common-law right, even absent a saving clause, is not to be abrogated "unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

426 U.S. 290, 298 (1976) (quoting *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907)),

quoted in Feikema, 16 F.3d at 1413. Moreover, the *Feikema* court found indications in RCRA's legislative history that some state causes of action should be permitted: "[W]hile Congress intended for the EPA to have broad authority to act in an imminent hazard situation, it also intended such action to complement other efforts and remedies." *Feikema*, 16 F.3d at 1415 (citing *Report of the Committee on Environment and Public Works*, S. Rep. No. 98-284, 98th Cong., 1st Sess. 56 (1983)). Because the Consent Order did not provide for damages payments to homeowners, the court found, awarding damages to the plaintiffs would not conflict with the Consent Order. Consequently, it allowed the damages claims to proceed. *Id.* at 1417-18.

Judge Murnaghan wrote separately in *Feikema* to emphasize that the court was not applying a different standard to damages than to equitable relief. *Id.* at 1418 (Murnaghan, J., concurring). He stressed that, whatever the relief sought, a "claim is preempted *only* to the extent that it may actually conflict with the EPA's Consent Order and *only* while that Order remains in effect." *Id.* (Murnaghan, J., concurring). In *Feikema*, he wrote, preemption applied to the injunction claim but not the damages claims because, on the particular facts of the case, an injunction would conflict with the Consent Order but a damages award would not. *Id.* (Murnaghan, J., concurring).

The EPA Orders in this case, like those in *Feikema*, do not contemplate compensation for damages to private parties. Thus the Cavallos contend that the damages they seek, like the award sought in *Feikema*, would not conflict with the EPA Orders. The district court disagreed with the Cavallos, relying on Judge Murnaghan's concurrence, and held that the Orders preempted any damages claims based on remediation efforts within the scope of the Orders:

> [D]amages claims are preempted insofar as they arise from remediation efforts under the scope of the EPA Orders. The damages sought here distinguish the

> case from those damages which were allowed in *Feikema*. Damage liability for activities in conformity with the EPA Orders *conflicts* with the federal interest as effectively as an injunction.

Memorandum Opinion and Order at 5, *in* Joint Appendix at 197 (citing 16 F.3d 1408, 1418 (4th Cir. 1994) (Murnaghan, J., concurring)).

The district court used the correct "conflict" test, and we agree that Star cannot be held liable "for activities *in conformity with* the EPA Orders." But that does not end the inquiry, as the district court appears to have assumed. Although all of Star's allegedly tortious acts occurred after the EPA took control of remediation, the EPA Orders encompassed only remediation efforts, and all of Star's activities at the Tank Farm did not involve remediation. Moreover, even EPA-directed remediation efforts might be actionable if improperly performed. To determine whether damages would conflict with the EPA Orders, then, we must look beyond the temporal scope of the Orders and the scope of the activities they encompassed. Damages claims conflict with EPA Orders only if the allegedly tortious activities (1) were required, directed, or supervised by the EPA, and (2) were performed properly.

In Count II, the Cavallos allege "negligence, carelessness and recklessness" by Star in:

> a. Improperly operating, supervising, and/or maning the [Tank Farm] Facility;
>
> b. Improperly designing, installing and repairing and updating of the Facility;
>
> c. Failure to properly test and inspect Facility equipment;
>
> d. Failure to properly and promptly notify Plaintiff and Mantua residents of the Petroleum releases at the Facility[;]

> e. Failure to properly and promptly remediate [sic] and recover/remove the Petroleum Releases[;] and
>
> f. Failure to properly mitigate venting of storage tanks.

Complaint ¶ 72, *in* Joint Appendix at 38. Count IV is based in part on the December 1991 spill, and in part on Star's regular venting of its tanks. Complaint ¶¶ 86-87, *in* Joint Appendix at 21.

To the extent they occurred after December 8, 1991,[8] incidents of improper operation, supervision, management, design, installation, repair, and updating of the Tank Farm or its equipment may be actionable if not compelled by the EPA Orders. Likewise, failure by Star to notify the Cavallos of petroleum releases may support their claims if the releases or failures to notify were not authorized or approved by the EPA. For example, the Complaint indicates that the December 10, 1991, AVJet spill was a mistake—not contemplated by EPA Orders or officials—and alleges that Star waited eight days before notifying the EPA. Complaint ¶¶ 26-43, *in* Joint Appendix at 28-31. Damages caused by that spill, or by Star's failure to notify the Cavallos during the period before it notified the EPA, thus are not preempted by the EPA Orders.

The EPA Orders did encompass all of Star's remediation efforts, so failures "to properly and promptly remediate and recover/remove the Petroleum Releases" are likely to be preempted. Similarly, the Cavallos allege that venting was "regularly performed," apparently under EPA supervision, so claims of improper venting probably are preempted. Even remediation and venting, however, are actionable if Star tortiously failed to notify the EPA of the releases—a jury might find, for instance, that the delay

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[8] The district court held that claims based on events before December 8, 1991, are barred by the statute of limitations, *see supra* part III.B, and the Cavallos do not appeal that ruling, *see supra* n.2.

after the December 1991 spill was negligent—or if Star improperly implemented EPA instructions.

In sum, the fact that allegedly tortious conduct occurred within the temporal and subject-matter scope of an EPA Order does not necessarily compel preemption of a damages claim based on that conduct. We cannot conclusively determine, from the face of the Complaint and the text of the EPA Orders, that the Orders or EPA instructions pursuant to the Orders compelled all of Star's allegedly improper activities and its manner of performing them. Thus we cannot determine whether damages based on those activities would conflict with EPA authority, or, in turn, whether the preemption doctrine applies.

C

The Cavallos assert that, because their claims are grounded in Virginia state law and originally were filed in Virginia state court, the admissibility of expert testimony should be governed by Virginia law. As Star points out, however, this court held expressly in *Scott v. Sears, Roebuck & Co.* that federal rules apply to the admission of expert testimony in diversity cases:

> Unlike evidentiary rules concerning burdens of proof or presumptions, the admissibility of expert testimony in federal court sitting in the diversity jurisdiction is controlled by federal law. State law, whatever it may be, is irrelevant.

789 F.2d 1052, 1054 (4th Cir. 1986). But the Cavallos respond that *Daubert*, which was decided seven years after *Scott*, implemented a heightened burden of proof—"established toxicological methodology" instead of "greater weight of all the evidence." Because *Scott* specifically excepted burdens of proof, they contend, the rule it established is invalid after *Daubert* and Virginia law should apply. Their argument is meritless. A standard for admission of testimony, however stringent, is not a burden of proof. *Daubert* governs whether evidence is admitted,

not how persuasive it must be to the factfinder. Consequently, *Scott* remains good law even after *Daubert*, and the district court correctly applied federal law in determining whether to admit the experts' testimony.

On the merits of the expert-testimony question, the Cavallos' brief succinctly stated the essence of their position:

> The trial court concluded that neither Dr. Bellanti nor Dr. Monroe strictly adhered to the established toxicological methodology in forming their conclusions that Ms. Cavallo's exposure to AVJet vapors from the December 1991 spill caused her various chronic illness[es], and that their testimony, therefore[,] is not supported by appropriate validation as required by *Daubert v. Merrell Dow*, 113 St.Ct. at 2795.

Cavallos' Brief at 17 (citation to Joint Appendix omitted).

The parties agree that *Daubert* is the leading case on this issue. But neither party emphasizes that the Supreme Court itself viewed *Daubert* as a liberalization, not a tightening, of the rules controlling admission of expert testimony. The Court recognized that the question had been governed for seventy years by the standard first set out by the D.C. Circuit in *Frye v. United States*—that scientific expert testimony must be based on principles that are "sufficiently established to have gained *general acceptance* in the particular field in which [they] belong[]," 293 F. 1013, 1014 (D.C. Cir. 1923) (emphasis added). It held, however, that the *Frye* test had been superseded by Fed. R. Evid. 702.

Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

The *Daubert* Court noted that Rule 702 does not mention *Frye*'s "general acceptance" test. Moreover, it stated:

> A rigid "general acceptance" requirement would be at odds with the "liberal thrust" of the Federal Rules and their "general approach of *relaxing* the traditional barriers to 'opinion' testimony." *Beech Aircraft Corp. v. Rainey*, 488 U.S. [153,] 169 (1988). . . . That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.

113 S. Ct. at 2794 (emphasis added) (citations to non-quoted sources omitted).

The *Daubert* Court held that two questions control admission of scientific expert testimony: "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 2796. In lieu of the *Frye* test, it decided, the validity of the methodoolgy or reasoning is determined using a flexible inquiry based on five factors: (1) whether the testimony has been tested, (2) whether it has been published or exposed to peer review, (3) its rate of error, (4) whether there are standards and controls over its implementation, and (5) whether it is generally accepted. *Id.* at 2796-97. If valid, the Court wrote, whether the testimony can "properly be applied to the facts in issue" is determined by reference to other rules of evidence, *id.* at 2797, such as the relevance and prejudice provisions of Rule 401, *id.* at 2794, and Rule 403, *id.* at 2798.

The *Daubert* Court concluded by reemphasizing that scientific evidence is to be admitted more liberally under Rule 702 than it was under *Frye*, and that exclusion is the least favored means of rendering questionable scientific evidence ineffective:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, and likewise to grant summary judgment. These conventional devices, rather than wholesale exclusion under an uncompromising "general acceptance" test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

Id. at 2798 (citations omitted).

In the instant case, the district court concluded that the bases of the doctors' opinions were not sufficiently established to warrant their admission into evidence:

> In sum, neither Dr. Monroe nor Dr. Bellanti sufficiently adhered to the established toxicology methodology in forming [his] conclusions that Ms. Cavallo's exposure to AVJet vapors from the December 1991 spill caused her various chronic illnesses. Their testimony, therefore[,] is not "supported by appropriate validation" as required by *Daubert*, and is ultimately unreliable. In the final analysis, the opinions of Drs. Monroe and Bellanti are based largely on hypothesis and speculation. This is not to say that the doctors are insincere in their opinions, or that their opinions may not some day be validated through scientific research and experiment. It may well be that the AJet spill forever "sensitized" Ms. Cavallo to petroleum vapors and various other household chemicals. But the published scientific literature and test results simply do not support that conclusion at this time. And the

price paid for this seemingly stringent standard of reliability is that, unavoidably, some legitimate injuries will be left unredressed.

Memorandum Opinion at 39-40, *in* Joint Appendix at 1799-800 (footnotes omitted).

The district court's interpretation is restrictive in this case, but it is not inconsistent with *Daubert*. Although *Daubert* eliminated the requirement of general acceptance, the five factors it established still require that the methodology and reasoning used by a witness have a significant place in the discourse of experts in the field. The district court determined that the testimony of Dr. Bellanti and Dr. Monroe did not have such a place. By making that determination, the court properly exercised its discretion. The Cavallos have shown that the question of admission is close, but we defer to the court's decision to exclude the evidence and affirm its summary judgment on Count I.

IV

The face of the Complaint and the text of the EPA Orders are insufficient to determine whether EPA involvement preempts Count II, the loss and use and enjoyment claim of Count III, and Count IV. Whatever the preemption doctrine's effect, however, the personal injury claim of Count III does not state a claim under Virginia law. Moreover, the district court acted within its discretion by excluding testimony by the Cavallos' experts. Accordingly, we affirm the district court's summary judgment on Count I and its dismissal of the personal injury claim of Count III, but we reverse its dismissal of Count II, the loss of use and enjoyment claim of Count III, and Count IV and remand them for further proceedings.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

[Not for Publication]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1287

ELIZABETH V. BOGOSIAN,
Plaintiff, Appellant,
v.

MERCEDES-BENZ OF NORTH AMERICA, INC.
and DAIMLER-BENZ NORTH AMERICA CORPORATION,
Defendants, Appellees.

Appeal from the United States District Court
for the District of Rhode Island
[Hon. Francis J. Boyle, *Senior U.S. District Judge*]

Before Torruella, *Chief Judge*,
Bownes, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*

November 21, 1996

STAHL, *Circuit Judge*. After being struck and injured by a rolling automobile, plaintiff-appellant Elizabeth V. Bogosian commenced this diversity action in Rhode Island District Court alleging strict product liability, negligence and breach of warranty against Mercedes-Benz of

North America, Inc. ("Mercedes-Benz") and Daimler-Benz North America Corporation.[1] The jury returned a verdict in favor of Mercedes-Benz on the strict liability claim, the only liability theory it considered.[2] Bogosian appeals, contending that the district court committed reversible error in (1) granting judgment as a matter of law in favor of Mercedes-Benz on the negligence claim, (2) excluding one of her expert witnesses, (3) excluding evidence of a product modification occurring after the manufacture of the automobile in question, but before the injurious event, and (4) denying her motion for new trial.

I.

Facts and Prior Proceedings

The facts are largely undisputed. On July 9, 1992, Bogosian drove her daughter's 1986 Mercedes Benz 560 SEL automobile ("560 SEL") to her home and pulled into the parking area adjacent to the driveway. The pavement on which she parked sloped slightly toward the rear of the car. According to her testimony, Bogosian placed the transmission gear selector lever, located on the console shift between the front driver and passenger seats, in the park position. She did not set the parking brake. She then removed the ignition key, locked the car doors, and walked toward her house. Upon approaching her front

[1] There is no indication in the record that Daimler-Benz of North America Corporation had any pertinent involvement (by way of design, manufacture, distributorship, sales, or otherwise) with the vehicle that injured Bogosian. At oral argument before this court, counsel for Bogosian was unable to clarify the status of this party-defendant, while counsel for Mercedes-Benz explained that the entity was a holding company, and confirmed that it had no relevant connection to the action. In the absence of any contrary assertion, we treat this case as involving only Mercedes-Benz of North America, Inc., the distributor of the vehicle.

[2] The breach of warranty claim, apparently disposed of at the summary judgment stage, is not at issue in this appeal.

door, she decided to check her mail and retraced her steps to the mailbox located near the street. As she was retrieving the mail, the 560 SEL—which had rolled from the parking area—struck her, knocked her down, and ran over her ankle, causing serious injury.

In July 1994, Bogosian sued the distributor[3] of the automobile (but not the manufacturer) to recover damages for her injuries. Underlying her tort claims were two design defect theories: (1) the absence of a "park ignition interlock," which would have prevented her from removing the ignition key if the vehicle was not in park gear, and (2) the existence of a "false park detent": a tactile phenomenon whereby the operator senses that the park gear is selected but in fact, the gear selector lever is not fully engaged in park.

II.

Judgment As a Matter of Law

Bogosian challenges the district court's grant of Mercedes-Benz's motion, pursuant to Fed. R. Civ. P. 50(a), for judgment as a matter of law on her negligence claim. The court granted the motion at the close of Bogosian's case in chief upon finding that she failed to produce evidence to establish an automobile distributor's standard of care. We review the grant of a Rule 50(a) motion *de novo*, considering the evidence and reasonable inferences therefrom in the light most favorable to the non-movant. *Andrade* v. *Jamestown Hous. Auth.*, 82 F.3d 1179, 1186 (1st Cir. 1996). The court may grant the motion only if the evidence, so viewed, would not permit a reasonable jury to find for the plaintiff on her claim. *Id.*

[3] The parties describe Mercedes-Benz as both the "distributor" and "seller" of the 560 SEL in question. For simplicity, we refer to Mercedes-Benz as the "distributor" only.

Under Rhode Island law, "[i]n order to sustain a cause of action for negligence the plaintiff is required to establish a standard of care as well as a deviation from that standard." *Marshall* v. *Tomaselli*, 372 A.2d 1280, 1283 (R.I. 1977). Thus, we review the record to determine if Bogosian introduced evidence sufficient to permit a reasonable jury to conclude that Mercedes-Benz deviated from some pertinent standard of care.

At trial, there was evidence that (1) the automobile industry first began to use park ignition interlocks [4] more than ten years before the 1986 sale of the 560 SEL, (2) by 1986, all vehicles sold in the United States having a gear shift *on the steering column* were equipped with the park interlock device, and (3) by 1986, 40% of vehicles that had a gear shift on the console (as did the 560 SEL) were equipped with the device. There was also testimony that installation of the park ignition interlock would result in a cost to the consumer of five to seven dollars. Bogosian contends, as she did below, that from this evidence the jury could have found that, in 1986, a distributor of a 560 SEL knew or should have known that the safety of the vehicle depended upon a park ignition interlock, and thus, a reasonably prudent distributor would have installed the inexpensive park ignition interlock mechanism.[5]

[4] The park ignition interlock acts to prevent a driver from removing the ignition key if the gear selector is in any position other than park.

[5] Our review of the transcript of the arguments on the Rule 50(a) motion reveals that Bogosian did *not* advance a "failure to warn" theory of negligence. We note first that there was no evidence introduced tending to establish what would have been an adequate warning, on the part of a distributor, with regard to the absence of a park ignition interlock. Moreover, having failed to raise before the district court any issue with regard to this possible theory, Bogosian has failed to preserve it for appeal. *See Wainwright Bank & Trust Co.* v. *Boulos*, 89 F.3d 17, 23 n.2 (1st Cir. 1996). Finally, other than quote the text of the Restatement of

Bogosian was required to produce evidence that the distributor of the 560 SEL deviated from a standard of care when it failed to install the park ignition interlock mechanism on her automobile. *See Scittarelli* v. *Providence Gas Co.*, 415 A.2d 1040, 1043 (R.I. 1980) (requiring plaintiff, under negligent inspection and test claim against a distributor, to "establish a standard of care with respect to inspection and testing and the defendant's deviation from that standard"). She presented no evidence—either through customary distributor practices, past practices, or expert testimony—to establish a standard of care by which Mercedes-Benz, as distributor, should have operated. Having utterly failed to establish that Mercedes-Benz acted below a minimum standard of care when it failed to install the park ignition interlock, Bogosian could not have prevailed on her negligence claim. Thus, the district court did not err in granting judgment as a matter of law in favor of Mercedes-Benz on this claim.[6]

III.

Expert Testimony on "False Park Detent" Theory

Bogosian contends that the district court erroneously excluded the proposed expert testimony of Joseph Davidson on the false park detent theory. After conducting an extensive voir dire, the court ruled that Davidson's testimony was inadmissible for three reasons: (1) it was not within Davidson's expertise to opine on the issue of trans-

Torts (Ssecond) § 401, Bogosian on appeal does nothing to hint at any developed argumentation on a failure to warn theory. *Ryan* v. *Royal Ins. Co. of Am.*, 916 F.2d 731, 734 (1st Cir. 1990) (explaining that appellate arguments adverted to perfunctorily are deemed abandoned). Thus, we will not consider Bogosian's arguments with respect to her negligence claim under a failure to warn theory.

[6] *See Tokio Marine & Fire Ins., Co.* v. *Grove Mfg. Co.*, 958 F.2d 1169, 1172 (1st Cir. 1992) (upholding directed verdict on negligence claim where plaintiff failed to present evidence of standard of care).

mission design; (2) his methodology in examining the 560 SEL to determine the cause of Bogosian's injury was unreliable; and (3) the factual foundation for his testimony was inadequate because Bogosian was unable to establish that the vehicle was in substantially the same condition at the time Davidson tested it as it was when the accident occurred.

A. Rule 702 Requirements and Standard of Review

When faced with a proffer of expert testimony, the district court must determine whether the expert witness is qualified and has specialized knowledge that will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702; *see generally United States* v. *Sepulveda*, 15 F.3d 1161, 1183 (1st Cir. 1993) (citing *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993)), *cert. denied*, 114 S. Ct. 2714 (1994). First, the court has broad discretionary powers in determining whether or not the proposed expert is qualified by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702; *see generally Richmond Steel, Inc.* v. *Puerto Rican Am. Ins. Co.*, 954 F.2d 19, 21 (1st Cir. 1992). Next, the court decides if the proposed subject matter of the expert opinion properly concerns "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702. Finally, the court performs a gatekeeping function to ascertain whether the testimony is helpful to the trier of fact, *i.e.*, whether it rests on a reliable foundation and is relevant to the facts of the case. *See Vadala* v. *Teledyne Indus., Inc.*, 44 F.3d 36, 39 (1st Cir. 1995); *see also Daubert*, 509 U.S. at 591 (characterizing this consideration as one of "fit.").

"Because gauging an expert witness's usefulness is almost always a case-specific inquiry, the law affords trial judges substantial discretion in connection with the admission or exclusion of opinion evidence." *Sepulveda*, 15 F.3d at 1183. Thus, we will uphold the district court's

ruling in this area unless it is "manifestly erroneous." *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962). With the foregoing precepts in mind, we turn to the facts of this case.

B. Qualifications

The record establishes that Davidson earned a Bachelor of Science degree in industrial and vocational education, and had been certified to teach vocational automobile mechanics. At the time of trial, he was certified by the National Institute for Automotive Service Excellence as a master automobile technician for diagnosis and repair of various vehicles, including passenger cars. He worked as an automobile mechanic from 1952 to 1967. Shortly thereafter, he became a "consultant in forensic automotive mechanics," now his full time employment.[7]

Davidson does not have an engineering degree, and his formal education in engineering was apparently limited to three semesters of "basic" electrical engineering courses at Carnegie-Mellon University before he dropped out. He explained that his hands-on experience made him familiar with automatic transmissions. He conceded that he had never professionally designed a component for an automobile, although he had done so "in the courtroom." He also conceded that he had never designed a transmission or a gear shift selector, and had no formal training in manufacturing automobiles or their components. He saw neither design drawings nor specifications of the 560 SEL, although he had reviewed service literature and "cutaway" drawings for the automobile. Of the 126

[7] When asked the meaning of the word "forensic" in this capacity, Davidson replied: "There are a number of meanings to the word 'forensic.' . . . It has to do with applying scientific principles to a problem using scientific techniques and technology. Another is 'suitable for use in the courts.' Still another is to persuade by convincing arguments. So all those meanings come together in the kind of work I do."

prior times that he had testified as an expert, only one of them involved the false park detent phenomenon.

Because Davidson would have testified that the false park detent rendered the 560 SEL dangerous, and he would have offered a corrective modification, the district court found that he essentially would have opined on the central issue of design defect.[8] The court acknowledged that Davidson was "a very well qualified master mechanic," but ruled that his expertise did not extend to the design defect issue at hand. On appeal, Bogosian challenges this ruling, which we review for clear error. *See Richmond Steel, Inc.*, 954 F.2d at 21; *DaSilva* v. *American Brands, Inc.*, 845 F.2d 356, 361 (1st Cir. 1988).

The record establishes that, at most, Davidson had extensive experience in automotive repair. His background shows a lack of any significant expertise—by way of knowledge, skill, experience, training, or education—in relevant areas such as the design or manufacture of automobiles or their components. *See Tokio Marine & Fire Ins. Co.* v. *Grove Mfg. Co.*, 958 F.2d 1169, 1175 (1st Cir. 1992) (upholding exclusion of proposed expert in design defect case where, *inter alia*, witness lacked familiarity in product's design, manufacture, marketing and applicable industry standards). While not dispositive, the lack of a mechanical engineering degree or other engineering expertise certainly calls into question Davidson's ability to criticize the design of a transmission parking mechanism and its operation under various circumstances.[9]

[8] Although Bogosian insisted that Davidson would not testify about design, but would only explain how the transmission worked, the record supports the court's finding that Davidson's conclusions embraced the subject of transmission design and defect; in the absence of clear error, we will not disturb this finding.

[9] *See, e.g., DaSilva*, 845 F.2d at 361 (finding mechanical engineer with twenty-three years of engineering experience and "extensive experience evaluating and recommending safety devices for machines" qualified to testify regarding safety design of industrial mixer);

On this background, we find no clear error in the district court's finding that Davidson was not qualified to opine on the issue of a transmission design defect.

C. Underlying Methodology

Davidson would have testified that he first identified the false park detent phenomenon in January 1979. He would have explained that a false park detent can occur when the gear selector lever is not placed completely in the park notch, which is set off to the left in the console shift, a position referred to as "latched park." *See* Appendix A. When the selector level is in latched park, the vehicle will not roll any appreciable distance. A position just short of latched park, however, could produce a false park detent—a tactile sensation that the car is fully in park gear. In this situation, the car is susceptible to rolling.[10]

Davidson would have testified that this false park detent is felt when one shifts rapidly from drive towards park, but fails to fully engage in the latched park position. He stated that if one were to look closely at the console shift, one would be able to see if the selector level was in a position, *e.g.*, between reverse and park, that would indicate the possibility of a false park detent. He explained that if the operator shifted slowly and carefully into park, he or she could not leave the selector level in anything

Kallio v. *Ford Motor Co.*, 391 N.W.2d 860, 861 (Ct. App. Minn. 1986) (describing testimony of various mechanical engineering experts in case where alleged transmission design defect created a "false park"), *aff'd*, 407 N.W.2d 92 (Minn. 1987).

[10] Davidson would have explained that, in a false park detent situation, the vehicle could roll because the park pawl in the transmission park mechanism was only "tip engaged" and the spring in the park linkage was not fully compressed. When the vehicle was in latched park, on the other hand, the park pawl would lock into the park slot on the park gear, thereby preventing the car from rolling.

but latched park.[11] He also stated that if the operator sees that the gear selector level is in the latched park position (*i.e.*, set off to the left), the false park detent phenomenon has no application.

With respect to his investigation of the facts of this case, Davidson stated that, in January 1994, he questioned Bogosian about the July 1992 events leading up to her injury. He examined the parking area of her home and measured the grade of the approximate location on which she had parked just before the 560 SEL rolled. He then travelled to an automobile garage, Fred's Autohaus, where the automobile was located. At the garage, Davidson tested and experimented with the action of the park lock in the vehicle's transmission mechanism.[12]

Based on his testing of the 560 SEL's transmission park mechanism, Davidson would have testified that the vehicle was capable of a false park detent. He would have opined that this phenomenon rendered the vehicle defective and unreasonably dangerous, and he would have offered a corrective solution involving a part modification. While the record is unclear on this point,[13]

[11] Because the gear selector lever is spring-loaded to the left, once the lever is sufficiently pushed forward towards the park position, it pulls to the left into the latched park position.

[12] Specifically, he first tested the transmission gear shifter to confirm that it was in good adjustment, then placed the selector lever in park. He lifted the right rear wheel off the ground, and turned it until the park pawl in the transmission locked into the park slot, *i.e.*, until the car was fully locked into park gear and the wheel would no longer turn. At that point, he moved the gear selector lever out of park and turned the right rear wheel further so that when he shifted back into park, the park pawl would hit the tip of the tooth on the park gear rather than drop straight in to the park slot. Thus, in order for the car to shift fully into latched park, the spring in the park pawl linkage inside the transmission would have to be compressed.

[13] The record before us does not contain a copy of Davidson's curriculum vitae, his report, supporting documents or exhibits, or

Davidson presumably would have opined that, given Bogosian's insistence that she placed the gear selector lever in park before exiting the automobile, this defect, in combination with the slight slope of the parking area, led to her injury.

Citing *Daubert*, the district court expressed its concern with the reasoning and methodology underlying Davidson's opinion. The court stated:

> Here the proffered evidence is that the vehicle was in a garage, the rear wheel was lifted and rotated, and the shift lever placed in a particular position with a result from which the witness apparently would extrapolate the conclusion that this is the way Plaintiff was injured. But there is no evidence that the so-called test that was used was anything that even remotely resembled a known technique. No proffer of any kind of scientific journal or paper, nothing of that sort to show that this is the way you find out that sort of thing.

The court further remarked that the "appropriate design of part of an automobile having to do with keeping it at rest after the car is stopped and the driver has left the driver's seat" was a "scientific" issue.

Bogosian contends that the court committed reversible error because it wrongly characterized the subject of Davidson's testimony as "scientific" rather than "technical," and thus, *Daubert* was inapplicable. Assuming *arguendo* that this case does not involve "scientific law" (and thus, *Daubert*'s holding does not apply), we must then consider "*Daubert*'s countervailing precept: that the trial judge is assigned 'the task of ensuring that an ex-

any other aspects of his proffer other than the transcript of the court proceedings. To the extent that the absence of any of these items creates any material doubt, that doubt is resolved against the appellant, Bogosian. *See LaRou* v. *Ridlon*, —— F.3d ——, No. 96-1229, 1996 WL 606436, at *5 (1st Cir. Oct. 28, 1996).

pert's testimony both rests on a reliable foundation and is relevant to the task at hand.' " *Vadala*, 44 F.3d at 39 (quoting *Daubert*, 509 U.S. at 597). Thus, even if *Daubert*'s specific discussion of the admissibility of scientific principles did not strictly apply to Davidson's testimony, the admissibility of the testimony was still controlled by the requirement of factual relevance and foundational reliability. *See* 509 U.S. at 591-92.

Here, the district court was troubled by Davidson's procedures in investigating the applicability of his false park detent theory to this case. Davidson examined the vehicle away from the site of the accident. He did not, in any way, attempt to replicate the known facts surrounding the injury-producing event, but rather, tested his theory by raising a rear wheel of the vehicle as it sat in Fred's Autohaus. On the record before us, it appears that Davidson did little more than come to the unremarkable conclusion that the vehicle's wheels would not turn when the gear selector lever was in latched park, but that they would turn when the lever was in any other position. *See supra* notes 12 & 13.

Moreover, Davidson's conclusion that a false park detent caused the injury-producing events assumed that Bogosian shifted the selector lever rapidly from drive towards park, and that she left the lever in a position short of latched park. First, there was no evidence as to the speed with which Bogosian shifted the selector lever. More importantly, Bogosian repeatedly testified that she looked at the console shift before exiting the vehicle and saw the selector lever in latched park. She steadfastly maintained this position, even after prompting from a generously worded question by her counsel on redirect examination. While, of course, the jury could have disregarded plaintiff's own testimony, it does little to tie the facts of this case to Davidson's proffered opinion, especially given his concession that there could be no false park detent if the vehicle operator observed the selector

lever in latched park. The district court appropriately found it very odd that Bogosian would present an expert witness who would testify that her own unwavering testimony was incorrect.

In the end, the district court clearly was not persuaded that Davidson's opinion rested upon a reliable factual and methodological foundation. While the district court may have inartfully cited *Daubert* in making its ruling, we cannot say that it abused its substantial discretion when finding inadequate the premises of the proposed testimony.

D. Substantially Same Condition

The district court's final concern with the proposed expert testimony was the lack of evidence to validate the condition of the 560 SEL at the time of Davidson's examination. Davidson tested the transmission parking mechanism on the automobile in January 1994, approximately one and a half years after the accident. Before Davidson's inspection, a "series of engineers" examined the vehicle on behalf of both Bogosian and Mercedes-Benz. At some point, the vehicle was transported to Fred's Autohaus, where it was placed on a lift; at yet some other unspecified time, the vehicle was sold to a third party. The court indicated that, given these events, Bogosian would have to present evidence sufficient to establish that the transmission mechanism was in substantially the same condition at the time of Davidson's tests as it was at the time of the accident.

In response to the court's concerns, Bogosian offered the testimony of her daughter, Evan Perri (the owner of the 560 SEL), who would have testified as to the physical whereabouts of the automobile during the time in question. Perri had no knowledge, however, about the tests or examinations performed during the various inspections. The court concluded that without the testimony of those who inspected the transmission before Davidson, Bogosian could not establish that Davidson's conclusions rested upon a reliable factual foundation.

Where, as here, a conclusion that a product was defective derives from a test or examination of it, there must be sufficient evidence to support a finding that the product was in substantially the same condition—in relevant respects—when tested as it was at the time of the accident. The absence of such a showing renders irrelevant any testimony based on the test or examination. *See Kukuruza* v. *General Elec. Co.*, 510 F.2d 1208, 1211-12 (1st Cir. 1975) (requiring a prima facie showing of substantial identity of the product's condition at the time of the accident and the time of inspection); *cf. Fusco* v. *General Motors Corp.*, 11 F.3d 259, 263-64 (1st Cir. 1993) (requiring a foundational showing of substantial similarity in circumstances between proffered demonstration and actual events).

Given that a number of experts examined and tested the 560 SEL in an attempt to determine why it unexpectedly rolled, the district court was warranted in requiring Bogosian to come forward with evidence sufficient to prove that those experts did not disturb the transmission mechanism in any material respect. *See Williams* v. *Briggs Co.*, 62 F.3d 703, 707-08 (5th Cir. 1995) (upholding exclusion of testimony about water heater malfunction where the expert conducted a test two years after the accident and after various, unspecified repairs were made); *see also Romano* v. *Ann & Hope Factory Outlet, Inc.*, 417 A.2d 1375, 1379-80 (R.I. 1980) (upholding, under Rhode Island evidence laws, trial court's discretionary exclusion of design-defect testimony where the expert examined the bicycle two years after the accident and after a previous expert's experiments) (collecting cases).

Because neither Davidson nor Perri was competent to establish the requisite similarity of condition, there was no evidentiary link between the condition of the transmission in July 1992 and in January 1994.[14] On these

[14] Although Davidson viewed service literature and "cutaway" drawings for the 560 SEL, he made no representations as to the relevance or accuracy of these documents with respect to the vehicle's transmission at either the time of the accident, or his examination, or both. More importantly, Davidson's January 1994 tests, not these documents, formed the basis of his testimony.

facts, Bogosian failed to make a prima facie showing that the condition of the transmission at the time of Davidson's testing was substantially similar to that on the accident date. Thus, we conclude that the court properly excluded Davidson's expert opinion, in part, on this basis. *See* Fed. R. Evid. 104(b) & advisory committee's note concerning (conditionally relevant evidence); *United States* v. *Wilson*, 798 F.2d 509, 515-16 (1st Cir. 1986) (explaining that a district court enjoys broad discretion in determining the admissibility of conditionally relevant material).[15]

In conclusion, we have considered carefully Bogosian's arguments and the record before us, and, for all of the foregoing reasons, we do not find the district court's decision to exclude Davidson's testimony to be manifestly erroneous.

IV.

Subsequent Remedial Measures

Bogosian claims error in the district court's refusal to allow her to question Mercedes-Benz's expert witness regarding the installation of park ignition interlocks on Mercedes-Benz vehicles apparently beginning with the 1990 model year. The installation of this interlock device occurred after the 1986 sale of the 560 SEL at issue here, but before Bogosian's accident in 1992. Bogosian argues that evidence of the modification was admissible because (1) Mercedes-Benz contested its feasibility, and, (2) in any event, Federal Rule of Evidence 407, which prohibits evidence of subsequent remedial measures under

[15] *See also Vadala*, 44 F.3d at 39 (finding witness's expertise irrelevant where the opinion lacked substantial factual basis); *United States* v. *Sorrentino*, 726 F.2d 876, 885 (1st Cir. 1984) (same).

certain circumstances, is inapplicable on the facts of this case.

Before trial, Mercedes-Benz stipulated to the feasibility of installing the park ignition interlock in 1986, and moved in limine for the exclusion of evidence regarding its use beginning 1990. During trial, Bogosian was allowed to introduce evidence regarding the feasibility of a park ignition interlock mechanism on a vehicle such as the 1986 560 SEL, to wit: its low cost and simple installation procedure. This evidence was uncontroverted. Subsequently, on cross-examination of Mercedes-Benz's only witness, Axel Stehle—the manager of product analysis at Mercedes-Benz—Bogosian asked if it was feasible in 1986 for Mercedes-Benz to equip the 560 SEL with the mechanism. Stehle, who had not testified about the subject on direct examination, answered, "Not to my knowledge." [16] At this, Bogosian sought to question Stehle about the subsequent modification. The court refused to allow the questioning, characterizing it as "bootstrapping."

Although this circuit has recognized that Federal Rule of Evidence 407 applies to strict liability cases, *see Raymond* v. *Raymond Corp.*, 938 F.2d 1518, 1523 (1st Cir. 1991), it does not apply where, as here, the modification took place before the accident that precipitated the suit. *Id.* In cases such as this, the district court may, if necessary, exclude evidence of the remedial modification by resort to its considerable discretion under Rule 403, which permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury. *See* Fed. R. Evid. 403; *Raymond*, 938 F.2d at 1523-24.

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[16] Although Stehle explained on direct that Mercedes-Benz chose to utilize a *steering* ignition interlock—which prevented normal steerability when the key was removed from the ignition—in order to comply with a federal standard, Stehle never opined on the issue of whether or not Mercedes-Benz was capable of installing the park ignition interlock in 1986.

A strict liability claim centers on the condition of the product " 'at the time it leaves the seller's hands.' " *Ritter* v. *Narragansett Elec. Co.*, 283 A.2d 255, 262 (R.I. 1971) (quoting Restatement (Second) of Torts § 402A cmt. g). For this reason,

> the introduction of evidence of pre-accident design modifications not made effective until after the manufacture of the allegedly defective product may reasonably be found unfairly prejudicial to the defendant and misleading to the jury for determining the question whether the product was unreasonably dangerous at the time of manufacture and sale.

Raymond, 938 F.2d at 1524. Thus, the district court may supportably exclude evidence of post-manufacture, pre-accident design modifications if its probative value is substantially outweighed by its prejudicial effects. *Id.*

Here, Mercedes-Benz stipulated pretrial that the park ignition interlock was a feasible modification in 1986. Accordingly, it did not controvert Bogosian's evidence regarding the ease with which Mercedes-Benz could have installed the mechanism, nor did it present testimony that the mechanism would have been impractical or impossible. Thus, the jury had before it uncontroverted evidence that Mercedes-Benz could have implemented the modification during the relevant time frame; any evidence that Mercedes-Benz, in fact, later modified its vehicles risked the danger that "jurors would too readily equate subsequent design modifications with admissions of a prior defective design." *Id.* at 1523. Given this, the court appropriately prohibited Bogosian from exploring the topic on cross-examination of Stehle, and further recognized that Bogosian was attempting to create a feasibility dispute where there was none.[17] Finally, having failed to

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[17] *See Albrecht* v. *Baltimore & Ohio R.R. Co.*, 808 F.2d 329, 331 (4th Cir. 1987) ("It is not for the plaintiff to put feasibility in issue, for feasibility is not in issue unless and until controverted

offer the stipulation to be read to the jury, Bogosian cannot now complain that such a reading would have been ineffective. We find that the district court did not abuse its considerable discretion in its treatment of this matter.

V.

Motion for New Trial

Bogosian argues that the district court erred in denying her motion for new trial. *See* Fed. R. Civ. P. 59. Bogosian contends that the evidence established that Mercedes-Benz knew or should have known that vehicle safety depended on the installation of a park ignition interlock, and that the lack of the interlock rendered the 560 SEL unreasonably dangerous and caused Bogosian's injury. Bogosian further asserts that, because the 560 SEL rolled, the gear selector lever must have only *appeared* to have been in the latched park position. Thus, she argues, "[t]he obvious inference to be drawn is that, in the absence of the car having been pushed by little green men, the car rolled because it was *not fully engaged* in the [latched park] position."

We review for abuse of discretion the denial of a Rule 59 motion for new trial. *Fernandez* v. *Corporacion Insular de Seguros*, 79 F.3d 207 (1st Cir. 1996). A new trial is warranted "only if the verdict, though rationally based on the evidence, 'was so clearly against the weight of the evidence as to amount to a manifest miscarriage of justice.'" *Id.* (quoting *Lama* v. *Borras*, 16 F.3d 473, 477 (1st Cir. 1994)).

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by the defendant."); *Gauthier* v. *AMF, Inc.*, 788 F.2d 634 (9th Cir. 1986) (explaining that, where defendant neither introduces evidence of infeasibility nor argues it, plaintiff may then "introduce evidence of feasibility other than subsequent remedial measures and could argue that defendant had not disputed the point." (quotation and citation omitted)), *amended by*, 805 F.2d 337 (9th Cir. 1986).

The district court instructed the jury that, to prevail on her strict product liability claim, Bogosian had to establish that the 560 SEL was in a defective condition unreasonably dangerous to the consumer, and that the defect caused her injury. *See Ritter*, 283 A.2d at 261 (citing Restatement (Second) of Torts § 402A for elements of strict product liability claim). There was evidence that the gear selector lever of the 560 SEL was in good working condition, and, when placed in full latched park, the vehicle would not roll. Thus, despite Bogosian's adamant testimony to the contrary, the jury could infer from the fact that the vehicle rolled that it was not in latched park just prior to her injury. The jury could also infer that a park ignition interlock would have prevented Bogosian from removing the ignition key, as she did, before she exited the vehicle.

For Bogosian to prevail on her claim, however, the jury had to find that the absence of a park ignition interlock constituted an *unreasonably dangerous* defect. A defect renders a product "unreasonably dangerous" if it "establishes a strong likelihood of injury to the . . . consumer . . . who is unaware of the danger involved in the use of a product in a way it was intended to be used or in using the product in a normal manner." *Ritter*, 283 A.2d at 263. Accordingly, the district court instructed the jury that a seller of a product does not have a "duty to provide an accident proof, perfect or foolproof product." The evidence established that only 40% of motor vehicles sold in the United States in 1986 with a console shift were equipped with a park interlock system. Moreover, there was conflicting evidence regarding whether, in 1986, the interlock mechanism was a safety or an anti-theft device. There was also evidence that the parking brake was in good order, and that, if Bogosian had used it as directed in the owner's manual, the vehicle would not have rolled regardless of the position of the gear selector lever. On this evidence, the jury was not compelled to find for Bogosian on her strict product liability

theory. We find that the district court did not abuse its discretion in denying the new trial motion.

VI.

Conclusion

For the foregoing reasons, we *affirm* the judgment of the district court in all respects. *Costs to appellees.*

[Appendix omitted.]